# APPENDIX A

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

**Constitution of the United States, Fifth Amendment:**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

**Constitution of West Virginia, Article III, Section 5:**

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted. Penalties shall be proportioned to the character and degree of the offence. No person shall be transported out of, or forced to leave the State for any offence committed within the same; nor shall any person, in any criminal case, be compelled to be a witness against himself, or be twice put in jeopardy of life or liberty for the same offence.

**West Virginia Code, Chapter 61, Article 2, Section 12, 1931, as amended:**

If any person commit, or attempt to commit, robbery by partial strangulation or suffocation, or by striking or beating, or by other violence to the person, or by the threat or presenting of firearms, or other deadly weapon or instrumentality whatsoever, he shall be guilty of a felony, and, upon conviction, shall be confined in the penitentiary not less than ten years. If any person commit, or attempt to commit, a robbery in any other mode or by any other means, except as provided for in

the succeeding paragraph of this section, he shall be guilty of a felony, and, upon conviction, shall be confined in the penitentiary not less than five nor more than eighteen years.

If any person (a) by force and violence, or by putting in fear, feloniously takes, or feloniously attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management or possession of, any bank, he shall be guilty of a felony, and, upon conviction, shall be confined in the penitentiary not less than ten nor more than twenty years; and if any person (b), in committing, or in attempting to commit, any offense defined in the preceding clause (a) of this paragraph, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, he shall be guilty of a felony, and, upon conviction, shall be confined in the penitentiary not less than ten years nor more than twenty-five years.

**West Virginia Code, Chapter 61, Article 11, Section 13, 1931, as amended:**

A person acquitted by the jury upon the facts and merits on a former trial may plead such acquittal in bar of a second prosecution for the same offense, notwithstanding any defect in the form or substance of the indictment or accusation on which he was acquitted.

# APPENDIX B
# OPINIONS BELOW

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

LEE SHEAR,
Petitioner

v. Civil Action File No. 570-E

OTTO C. BOLES, Warden of the West Virginia State Penitentiary,
Respondent

## MEMORANDUM

This memorandum concerns a habeas corpus petition instituted by Lee Shear, an inmate of the West Virginia Penitentiary. The circumstances leading to Shear's present incarceration are as follows.

On February 10, 1964, the Ohio County Grand Jury returned two indictments against Shear. Felony indictment 214 appears to relate to an attempted armed robbery of one George Carter during January, 1964. Felony indictment 215 similarly appears to relate to an attempted armed robbery on one Robert Rose in December, 1963.

On February 14, 1964, Shear, who was represented by two earlier court appointed attorneys, appeared before the Intermediate Court of Ohio County, West Virginia, and pleaded guilty to the charges contained in both indictments. He was, on the same day, given two concurrent ten year prison terms at the West Virginia State Penitentiary. Shear was credited for the time spent in the Ohio County Jail awaiting trial from the day of his arrest on January 4, 1964.

Shear filed a petition for habeas corpus with the West Virginia State Supreme Court of Appeals on May 22, 1964, contending, for the most part, (1) that his court appointed counsel had not adequately represented him; and (2) that his guilty pleas were coerced, mainly by the threats of his court appointed counsel and of the Judge of the Ohio County Intermediate Court. On June 8, 1964, the writ was refused.

On July 22, 1964, Shear petitioned this Court for federal habeas corpus relief, in Civil Action File No. 1389-W, again alleging, for the most part, (1) ineffective assistance of counsel, and (2) coercion of his two guilty pleas. Charles F. Paul, then Judge of this Court, appointed counsel and granted a plenary hearing, which was conducted on September 22, 1964. Judge Paul then found (1) that Shear had been afforded effective assistance of counsel, but (2) that the pleas had been involuntary.

By order entered September 22, 1964, Judge Paul determined that Lee Shear be released from incarceration, but that the release be stayed for ten days, during which time the State might initiate proceedings for the purpose of rearresting and retrying Shear on the two indictments.

Subsequently, Shear went to jury trial on the two charges contained in each indictment. His trials were conducted in the appropriate court of Ohio County. He was represented by the same two attorneys who had earlier handled his federal habeas corpus proceedings. He was not tried before the same state trial court judge who had accepted his guilty pleas in February, 1964.

On October 28, 1964, the jury found Shear guilty of the charges precipitated by felony indictment number 214. On February 3, 1965, at a subsequent term of court, with an entirely new jury panel from that which the earlier jury had been selected, a second jury returned a guilty verdict as to the charges precipitated by felony indictment number 215. On January 11, 1965, Shear was sentenced to fifteen years at the West Virginia Penitentiary in Moundsville for the first conviction, and on February 3, 1965, he was given a consecutive fifteen year sentence at the same institution for the second felony conviction. Under West Virginia Code, § 61-2-12 (Michie 1966), armed robbery and attempted armed robbery carry a minimum of ten years confinement.

At this point, it should be noted that while the copies of the indictments contained in the court file indicate that both indictments returned against Shear were for attempted armed robbery, this Court notes that copies of the second sentencing court's two orders recite that Shear's second sentences are

posited on his having been convicted of armed robbery, and not attempted armed robbery. Shear himself states in his petition that he is serving because of convictions for armed robbery, and the trial transcript of felony indictment 214 supports him in at least the one instance. The Respondent's answer to the Court's latest show cause order also indicates Shear is correct when he states that he is serving for armed robbery.

As has been indicated, this possible discrepancy is not critical as to the amount of time which Shear may be required to serve, because under West Virginia Code, § 61-2-12 (Michie 1966), both armed robbery and attempted armed robbery carry the same sentences. What is critical, of course, is whether Shear was sufficiently informed of the offenses with which he was actually charged.

Having raised this side issue, the Court now redirects its attention to the circumstances surrounding Shear's present incarceration. The record is silent as to whether Shear was credited with the time served following his initial incarceration on January 4, 1964, and up to the imposition of sentence for his first felony conviction on January 11, 1965.

If he was so credited, his two new sentences then would run approximately 29 years beyond January 11, 1965. If he was not credited, the total length of his incarceration, absent parole, would be about 31 years beyond January 4, 1964. Since the trial judge who imposed both later sentences did not indicate whether credit was to be given, this Court must assume that Shear was not given the benefit of the time he had already served. He would, of course, later be eligible for a deduction from his sentence for good conduct under West Virginia Code, § 28-5-27 (Michie 1966).

On April 30, 1965, Shear petitioned the West Virginia State Supreme Court of Appeals for habeas corpus relief, contending (1) that his trials for the two felony charges, after Judge Paul had granted federal habeas corpus relief, constituted "double jeojardy" within the meaning of the United States Constitution; (2) that he was Constitutionally aggrieved when the State failed to reindict him before he was subjected to the two subsequent trials; and (3) that the imposition of more

severe sentences the second time in the state trial court was Constitutionally impermissible.

On July 12, 1965, the Supreme Court of West Virginia summarily denied the petition without a hearing.

On December 1, 1965, Lee Shear then petitioned this Court for federal habeas corpus relief, generally contending (1) that he had been denied his rights, as enunciated in *Escobedo* v. *Illinois*, 378 U. S. 478 (1964); and (2) that the state trial court was not Constitutionally entitled to impose a longer prison obligation, after his two subsequent jury trials and guilty verdicts, than he had originally received after entering his two guilty pleas.

On the day Shear's petition was filed, the Court ordered the Respondent to show cause why the relief prayed for should not be granted, and on December 13, 1965, the Respondent answered, contending, in part, that Shear had not exhausted his available state remedies, as is now necessitated by the Court's ruling in *Miller* v. *Boles*, 248 F. Supp. 49 (N. D. W. Va. 1965). On January 12, 1966, therefore, the Court ordered Shear's petition be dismissed, because of the reasons suggested by the Respondent. Several weeks later the Court also denied a certificate of probable cause, but allowed Shear leave to proceed further on appeal in forma pauperis.

It was in this posture that the case was appealed to the Fourth Circuit Court of Appeals in February, 1966.

Because one of the contentions in the present petition raises novel questions regarding the rights of a successful habeas corpus applicant, on the occasion of renewed state prosecution, the Court asked that the case be remanded for further consideration. This request was granted by order dated March 9, 1966.

The present opinion is confined to the following two questions of law: (1) May a successful habeas corpus applicant, serving a state imposed sentence, on the occasion of renewed prosecution, be given a more severe sentence than that originally given; and (2) may the second sentence be imposed without giving credit for time already served under the first sentence?

Whether or not Shear was Constitutionally aggrieved by the seeming discrepancy between the indictments and the

offenses for which he has been convicted is a question which this Court does not answer at this time, partly because the contention has not been raised anywhere in the record of the case, and partly because this Court requested a remand only for the specific purpose of considering the Constitutional issues underlying more severe second sentencings.

It has been traditionally accepted that a state may reinstitute criminal proceedings against a successful habeas corpus applicant. *Irvin* v. *Dowd*, 366 U. S. 717, 728-729 (1961); *Wiman* v. *Argo*, 308 F. 2d 674 (5th Cir. 1962); *Wiman* v. *Powell*, 293 F. 2d 605 (5th Cir. 1961); *U. S. ex rel. Jones* v. *Nash*, 264 F. 2d 610 (8th Cir. 1959); *U. S. ex rel. Almeida* v. *Baldi*, 195 F. 2d 815, 825 (fn. 30) (3rd Cir. 1952); *Mitchell* v. *Youell*, 130 F. 2d 880 (4th Cir. 1942); 39 C. J. S. *Habeas Corpus*, § 104 (1944); 25 AM. JUR. *Habeas Corpus*, § 157 (1940).

Recently, however, some have challenged a state's power to impose a longer sentence in a new criminal proceeding. *E. g.*, Van Alstyne, *In Gideon's Wake: Harsher Penalties and the "Successful" Criminal Appellant*, 74 Yale L. J. 606 (1965). The main thrust of such arguments is that to require a criminal defendant to risk the chance of a more severe sentence, as a condition of exercising his Constitutional right to a fair trial, results in an unconstitutional plight. More simply stated, it is unconscionable to place a petitioner in a quandry. On one hand, he might continue to serve a sentence which is Constitutionally void. On the other hand, he might face the risk of a more severe sentence if he tries to remedy the existing Constitutional deficiency. This dilemma, it is maintained, is not consistent with due process.

But just as this Court is cognizant of one side of the argument, so too is it aware of the other. There are compelling reasons for judicial restraint by a federal habeas corpus court.

In the first place, some of the arguments of law cited by the opponents of more severe sentencings are not entirely dispositive. Those who argue against the imposition of a longer second sentence often refer to the Constitutional principle stated in *Green* v. *U. S.*, 355 U. S. 184 (1957), which has been made applicable to the states via the fourteenth amendment in *U. S. ex rel. Hetenyi* v. *Wilkins*, 348 F. 2d 844 (2d Cir. 1965),

*cert. den. sub nom. Mancusi* v. *Hetenyi* (No. 933), 383 U. S. 913 (1966), whereby a defendant who successfully appeals a criminal conviction may not thereafter be tried and convicted of a higher offense arising out of the same factual circumstances, and which for all purposes he has already been acquitted. "The law should not, and in our judgment does not, place the defendant in such an incredible dilemma." *Green* v. *U. S. supra* at 193.

But the analogy, though valid up to a certain point, can be critically examined. In the *Green* type cases, that which is in issue is whether a defendant, in the new proceedings, should be charged again with a crime for which a jury has already chosen not to convict him. In other words, does an appellant waive his defense of double jeopardy? As Justice Black, writing for the majority in *Green*, pointed out, on pages 187-188:

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

In the habeas corpus cases where a successful applicant is subjected to new criminal proceedings, on the other hand, there is no question of double jeopardy. See 22 C. J. S. *Criminal Law*, § 266 (1961). The state is not attempting to convict a successful habeas corpus applicant of a substantive offense for which he was already acquitted; he is discharged from custody, not from the penalty.

A second reason dissuading a federal habeas corpus court from interfering with a state court's imposition of a longer sentence, in renewed criminal proceedings, is the recognition and respect for the delicate federal-state relationship, examined by this Court in *Miller* v. *Boles, supra* 248 F. Supp. 49 (N. D. W. Va. 1965).

The third and most compelling reason for judicial restraint, however, is the fear of undermining the traditional role of

the trial judge. While it may be unconscionable to place a petitioner in a dilemma, the Court, where possible, must also respect the function of the trial, i. e., sentencing judge. Public policy so dictates.

It goes without saying that a trial judge is singularly qualified to pass sentence on a defendant. Not only has he in most instances had the benefit of pre-sentence reports, compiled by that court's competent officials, but he also has had the opportunity to observe, first hand, the demeanor of the defendant. Only the trial judge is able to take into account the defendant's personality and character. A trial court's liberation is vital in justly determining the desirability and extent of retribution or rehabilitation, as the case may be, of the defendant and in determining what type of institution defendant should in good conscience be committed (*e. g.*, maximum or minimum security). Moreover, it is the trial judge, rather than a post conviction reviewing judge, who is most aware of the actual as well as the extenuating circumstances of the defendant's crime. Consequently, it is the trial judge who is best equipped to consider the degree of the crime's heinousness and the amout of punishment or compassion merited. These notions, regarding the singular qualifications of the trial judge in sentencing, have been carefully and studiously built into our judicial system; they obivously underlie the basic difference, and historic limitations, between the trial courts, on the one hand, and the appellate courts, on the other.

In Shear's case, where following his intial arrest, he pleaded guilty to the two charges, and, therefore, avoided the necessity for a trial, the first sentencing judge may not have had a meaningful opportunity to weigh Shear's character and to consider the other important, intangible factors which play a vital role in the determinination of a sentence. Neither did the first sentencing judge have the opportunity on trial to consider fully the circumstances and details of the offense. Consequently, he was not able to give to these phases of Petitioner's case the necessary weight in the determination of Shear's sentences. It may well be that when the occasion did arise for a trial, the trial judge, i. e., the second sentencing judge, was made more aware of the serious nature of the crimes involved, than had been the first sentencing judge, who

did not have the opportunity to sit through a trial where all the circumstances of the two armed robbery attempts were brought to complete focus.

In other words, Shear's second sentencing judge may have been afforded observation of factors not available to Shear's first sentencing judge. The addition of these factors may have been the reason for the harsher penalty.

What the Court says is that there are good and valid reasons which restrain a habeas corpus court from interfering with the more severe sentence imposed on a succesful habeas corpus applicant. The Court, however, does not overlook that under certain circumstances a petitioner's plight cannot be ignored.

The means of arriving at this reconciliation, the Court feels, is by recognizing and accepting the proposition that there is a distinction between those cases where the second sentencing judge has acted with retributive intent, or as an inquisitor, from those cases where he has conscientiously fulfilled his role as a trial, or sentencing, judge.

This step, or a similar one, must be taken. If not, a court would have to conclude either that a successful habeas corpus applicant, subjected to a longer second sentence, has never been Constitutionally prejudiced, or that a sentencing judge is never entitled to impose a sentence in any way more severe than the first. To establish either as a stark, mechanical rule, however, is to beg the issue and do justice to neither the aggrieved petitioner nor to society and its trial courts.

Distinguishing these two types of cases, in the manner above suggested, is helpful in singling out those instances in which the petitioner has been Constitutionally aggrieved.

But to conclude that a court should distinguish these two types of cases, based on the sentencing judge's attitude, without saying more, is to leave the question half-answered, for the underlying issue then would be: "When has the sentencing judge acted in a retributive manner, or as an inquisitor, rather than as a judge?" Cf. *Smartt* v. *Avery*, 35 U.S.L. Week 2381 (C.A. 6, Jan. 6, 1967):

> "The (Tennessee) parole board's regulation, on its face, assesses an additional year of incarceration prior to consideration for parole of any state prisoner who files a peti-

tion for writ of habeas corpus and has the same denied. The right of a state prisoner to petition for writ of habeas corpus in the federal courts on a claim that he is in custody in violation of the Constitution or laws of the United States is squarely authorized by federal law. The exercise of this right may not be denied by state law. No more may its exercise be discouraged by the withholding of a privilege that would otherwise be accorded by state law or regulation."

To answer the issue fully, a habeas corpus court needs standards or criteria, by which it may review, in an objective manner, the second sentencing court's intent.

This Court recognizes the futility of court-established standards meant to apply to abstract, theoretical situations. The major accomplishment is to articulate criteria which have clear relevance to the instant case, and to the facts of each situation.

Said in another fashion, once a court adopts the general proposition that a second sentencing judge cannot act out of retribution, or as in inquisitor, but must remain a judge, in the true sense of the word, it then must take a second step and adopt criteria by which to determine, in an objective manner, if the second sentencing judge has remained loyal to judicial objectivity. By so doing, a court attempts to fairly reconcile (1) the dilemma which a habeas corpus petitioner faces, and (2) the freedom of discretion which any trial judge must enjoy.

Another recourse for a habeas corpus court, in determining the existence or absence of retributive intent, would be to depose the sentencing judge, or subject him to a plenary hearing. The propriety behind such an act, however, is extremely tenuous, and, despite the analogous provisions of 28 U.S.C. §2245, such a procedure, novel to the history of American jurisprudence, would be repugnant to our historic concept of federal-state relations.

Even more distasteful and unpalatable is the issue of whether a state sentencing judge could be compelled to testify, in a federal plenary hearing, as to his motives.

Appropriately, the federal habeas corpus court's forte is to apply *ad hoc* standards, and in this manner strive for an objective determination.

The Court does not now attempt to anticipate every criterion or standard conceivably applicable in determining whether a sentencing judge has stepped out of his traditional role and into that of a prosecutor, but looks only to those which are applicable to the present case.

One standard to be considered is whether the second sentence, or sentences, is, or are, more severe than the first. It can not be denied that the imposition of a more severe sentence could be an act of retribution, outside the dignity of judicial temperament, and certainly prejudicial to a petitioner. This criterion, as is so often the situation, is not singularly dispositive of an answer. The mere fact that the same judge has given a successful habeas corpus applicant a more severe sentence than that initially imposed does not necessarily imply a retributive intent on the judge's part. As has been indicated, the trial judge may have perfectly plausible reasons for his actions. It is one factor to be considered.

Two additional criteria, as apply to this case, would be whether the second sentencing judge objectively manifested a hostile attitude, either through words or actions, and whether the second sentencing judge was in any manner related to the first sentencing judge, either through family, business or close social connections, or to anyone participating in the first prosecution.

A final, and quite important, standard is whether the second sentencing judge is the same judge who had imposed the first sentence or sentences. It seems tenuous to suggest that the mere imposition of a more severe sentence, without more, amounts to a Constitutional deprivation. It is a much closer question, however, when the more severe sentence is meted out by the same judge who imposed the first sentence. It would not seem wise to discount the possibility of retribution.

To repeat, no one of these standards, in itself, is conclusory as to whether the sentencing judge had stepped out of his tra-

ditional role and into that of an inquisitor. Rather, all the criteria must be looked at *in toto* and a determination made, giving to each its due weight.

Looking at all the applicable factors in Shear's case, consequently, the Court notes, on one hand, that Shear has been subjected to a more severe sentence. His ten year term was increased to approximately thirty. On the other hand, the Court fails to find any indication of personal hostility by the judge who imposed the two consecutive fifteen year sentences of which Shear now complains. The record makes no such disclosure. To the contrary, the trial transcript of felony indictment number 214 discloses that the trial judge was very cognizant of Shear's rights under *Escobedo* and was conscientious in providing Shear with a fair trial. The Court also fails to find any meaningful relationship between the second sentencing judge and anyone connected with Shear's first convictions. Shear has stated that the state prosecutor in his trials, after he had been awarded federal habeas corpus relief, was a brother-in-law to the first sentencing judge. He may be correct in his assertion. But this relationship suggests nothing concerning the attituted of the second sentencing judge. The second judge, to repeat, was not the same judge who had first imposed the two ten year concurrent terms.

Therefore, looking *in toto* at all the criteria applicable to Shear's case, this Court must conclude that it cannot be said, in an objective manner, that Shear's second sentencing judge, when passing sentence, had ceased to perform his function as a judge and had taken on the role of an inquisitor.

No doubt, the thought of Shear's spending an additional twenty years in prison merits sober reflection, both by this, and any other court to which Shear applies for post conviction relief. But this fact is not singularly a valid reason to impose a substitution of judgment by a habeas corpus court under the guise of Constitutional infraction.

A sentencing court, absent retributive intent on its part, and for cause which it conscientiously deems sufficient, either has the power, or does not have the power to impose a stiffer second sentence. If it does have the power, a conclusion which

this Court adopts, then it should not be abridged in its unbiased use of that power. A post conviction review court cannot thereafter conclude that a five year additional sentence would have been Constitutionally permissible, but a twenty year sentence would be inconsistent with due process. A habeas corpus court cannot assume the function and discretion of a sentencing court. This Court is not entitled to judge the Constitutionality of Shear's second sentences merely by their length.

Of course, a sentencing court, if motivated by retribution, could not impose a stiffer second sentence without Constitutionally prejudicing a successful habeas corpus petitioner. But, as has been indicated above, it cannot here be objectively concluded that Shear's second sentences were motivated by retributive intent.

In the recent case of *Patton* v. *North Carolina*, 256 F. Supp. 225 (W.D. N.C. 1966), where the federal habeas court had to decide questions identical to the present ones, it was concluded that harsher punishment may be Constitutionally imposed at a second trial if there is a discernible reason for so doing.

For two reasons, therefore, our present holding does not conflict with *Patton*. First, there may well have been a discernible reason in this case for giving Shear a more severe sentence since the second sentencing court, as previously indicated, was able to hear testimony concerning the details of the two offenses and was able, over a meaningful period of time, to observe the petitioner's attitude and weigh all the intangible factors which constitute a trial court's determination of sentence. This the first sentencing judge was not able to do, to the same extent. To repeat, this Court cannot now say that the evidence adduced at trial, and the intangibles thus able to be considered, were not discernible reasons for imposing a more severe punishment than that initially imposed. Such action by this Court, sitting in post conviction review, would totally undermine the function of a sentencing court.

Secondly, one of the *ad hoc* standards employed by this Court in Shear's case, to weight objectively the second sentencing judge's attitude, would necessitate a diametrically op-

posite result if used in *Patton.* In Shear's case, there is neither indication, nor suggestion, that the second sentencing judge manifested any personal hostility towards the petitioner, whereas in Eddie Patton's case there is a contention, apparently unrefuted, that prior to imposing sentence the second sentencing judge remarked that he "would teach these jail house lawyers." It is obvious, therefore, that in *Patton's* case there is much more reason, in arriving at an objective determination of the second sentencing judge's attitude, for concluding that the second sentencing judge had acted the role of an inquisitor.

In *Patton* v. *North Carolina, supra,* 256 F. Supp. 225, it was held that denial of credit at a second trial for time already served is a violation of the Fourteenth Amendment.

It would appear from the record that Shear was not given credit for the time he had already served under his first sentences. Since Shear is not entitled to his immediate release, however, the traditional theory precludes habeas corpus at this time. Neither do the circumstances merit an exception to the traditional rule. See *Tucker* v. *Peyton,* 357 F. 2d 115 (4th Cir. 1966). Therefore, the Court will not at this time rule upon this question.

Finally, in concluding this commentary, the Court is obliged to note that incidental to the contentions inherent in this litigation, and in a great sense overshadowing the specifics alleged in every federal petition for habeas corpus, is the vaguely hinted or insidiously suggested innuendo, or the outright declaration, that trial court judges cannot be trusted to exercise and perform the responsibilities of their positions; that our system of jurisprudence has somehow degenerated into a shabby, unashamed predator on the sensibilities, humanities and personal respectability of those who are charged with violations of society's standards of behavior.

If the past is prologue, the present is permeated with fear, unfounded, but gaining acceptance in many quarters at an alarming rate, that is unjustifiably destroying the public faith and trust necessary to the honorable administration of our system of law and order.

Apart from the principles and legalities that determine the issues, this Court does not subscribe to the theory that the trial courts of our land are staffed with men who are flippant and frivolous to the study and application of the science of law. This Court does subscribe to the belief that the state trial courts of our land are genuinely concerned; recognize the need of wisdom and deliberation in our court system; and constantly strive to obtain objective, unprejudiced understanding of the individuals brought before them. This Court believes that the state trial courts are conscientious, fair, considerate and cooperative in endeavoring to establish and maintain the proper balance between offending individuals and an offended society.

Undoubtedly there is no profession in today's complex society, and this has been true throughout history, that has dared to exercise more independence of thought and action than those of the law profession; that have dared to stand boldly and unafraid, to voice their convictions and beliefs, regardless of the prevailing notions and emotional riptides of the time.

The courage and strength of the membership of the legal community in today's Nation, often characterized as cowardly, "afraid to get involved" society, is a refreshing and wholesome joinder with the strength of character that has given us the system of law and order we enjoy today.

This Court can never abandon its belief that every court, federal, state and local, holds a deep and abiding sense of personal and professional pride, justified by its work product, of assisting the helpless and aiding the oppressed, while at the same time, and compatible with the foregoing, maintaining a healthy and vigorous respect for the obligation to maintain a government by the governed and to preserve a nation gifted with as well as dedicated to a rule of law.

Blackstone (Commentaries Bk. 1, 69) in speaking of judges said "They are the depositories of the laws, the living oracles, who must decide in all cases of doubt, and who are bound by an oath to decide according to the law of the land." Assuredly, we recognize that public security against an abuse of such responsibility rests on the responsibility of the individual em-

powered with the authority and who is bound by the obligation.

As in the instant case, when a judge imposes a longer sentence after a new trial, he leaves himself open to a charge of prejudice and injustice. What Holmes called "the appearance of justice" has not been preserved. The easy path for the sentencing judge, in a second instance, would be to follow the initial sentence. In some cases the imposition of a more severe sentence requires a special form of judicial courage. The charges against the trial judge, which he knows will come, are obvious. His sole defense to such charges is his personal integrity as a jurist and as a person. Professionally, ethically, and perhaps to the detriment of society, justice and our system of law, the accused judge stands mute to the charges and clamor of evil and wrongdoing. If he has decided in good conscience that this is the appropriate retribution owing to society, we must realize that he is duty bound to exercise that judgment. There is no reason why the first or initial sentence should be considered any more sacrosanct than the second or succeeding sentence. To hold otherwise, would be to say that the judicial branch of our government is not to be trusted with the discretion that the legislative bodies have seen fit to repose for management in the courts.

The late Chief Justice Bolitha J. Laws of the United States District Court for the District of Columbia once noted:

> "The sentencing of the convicted offender demands of the trial judge the best that he has in wisdom, knowledge, and insight, as a jurist and as a human being. Difficult as it is to do, he must constantly weigh in the balance a future course of life of the individual before him with his judicial responsibility for the protection of the community."

Writing recently in 45 Nebraska Law Review 499, 509 (1966), Chief Judge Theodore Levin, of the United States District Court for the Eastern District of Michigan, concluded his remarks with this statement:

> "Courts, in the sentencing of convicted persons, must be something other than mechanical instruments of punish-

ment. The symbolic blindfold on the statute of Justice was never intended to obscure from the sight of the judge an understanding of the human being who stands before him awaiting judgment. The quality of sentencing must concern us no less than the quality of the entire judicial process which preceeds it."

The judge's responsibility in sentencing an individual is a difficult, arduous and exacting responsibility. There can be no simple or rigid formula imposed upon him in carrying out the sentencing function, which is critical to the fulfillment of justice as well as the prevention of crime.

It should be noted that more and more trial court judges are recognizing that the sentencing of offenders who come before them is a most difficult assignment. More and more the trial court judges are attending meetings and conferences to discuss sentencing procedures to find new and better ways to discharge their sentencing responsibilities. This is another indication of the dedication and conviction which historically attends the discharge of responsibilities by the membership of the legal profession.

The threat of harsher sentences on successful habeas corpus applicants certainly can become a tool by which to prevent state or federal prisoners from seeking redress of Constitutional deprivations previously suffered. It also places would-be petitioners in a dilemma. But the need for preserving the traditional role of the sentencing judge, who has acted in a conscientious manner, demands that each case, wherein a successful habeas corpus applicant has received a more severe sentence in new criminal proceedings, be considered on an *ad hoc* basis.

Having done so in this case, and in the manner above indicated, the Court is of the opinion that Shear was not Constitutionally aggrieved. Therefore, an order will be entered, denying the writ of habeas corpus.

ROBERT E. MAXWELL
United States District Judge

February 3, 1967

EDDIE W. PATTON, Appellee,

v.

STATE OF NORTH CAROLINA,
Appellant.

No. 11005.

The question raised by this appeal is whether a defendant may be sentenced to a longer term of imprisonment at his second trial than he received after his first conviction, vacated on constitutional grounds.

Unrepresented by counsel, the petitioner, Eddie W. Patton, was tried in October, 1960 and convicted of armed robbery after a plea of nolo contendere, entered at the close of the State's evidence. He was sentenced to prison for a term of twenty years. No appeal was taken, but in April 1964, Patton applied for a state post-conviction hearing, and on the basis of the Supreme Court's landmark decision in Gideon v. Wainwright, 372 U. S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963), was awarded a new trial.

Patton remained in custody, and on February 17, 1965, after tendering a plea of not guilty, he was again convicted by jury on the original indictment. This time he had the assistance of counsel, who called the court's attention to the fact that the defendant had been continuously imprisoned from June 10, 1960 and had already served nearly five years for the offense. Although the trial judge paid lip service to the idea of crediting Patton with that portion of the initial twenty-year sentence already served, he actually increased Patton's punishment by imposing, in effect, a twenty-*five*-year sentence and then deducting five years for the time served.[1] Thus, as a

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[1] "THE COURT: Before I announce punishment, I will take into consideration the fact that he has served four years, or nearly five years.

* * *

"THE COURT: * * * I would give you five more years than what I am giving you, but I am allowing you credit for the time that you have served. Judgment of the Court is that the Defendant be imprisoned in the State's Prison for a term of twenty years * * *."

result of seeking and obtaining a new trial, the prisoner, who originally would have been eligible for parole in October 1965, now, it is agreed, will not become eligible until February 1970.

Regardless of whether the action of the sentencing judge is verbalized as a twenty-year sentence without credit for the five years already served, or as a twenty-five-year sentence with credit, the practical effect of the second judge's sentence is to compel the defendant to serve five years longer to become eligible for parole, than he would have been required to serve had he not asserted his constitutional right to a fair trial.

Patton applied in August 1965 to the District Court for a writ of habeas corpus contending that a harsher sentence following a second conviction for the same offense, after the initial conviction has been vacated on constitutional grounds, is a denial of due process of law; is inconsistent with the prohibition against double jeopardy; and is a denial of equal protection of the law. The District Court held Patton's sentence unconstitutional on the ground that the increased punishment violated the due process and equal protection clauses of the Fourteenth Amendment. Patton v. North Carolina, 256 F. Supp. 225 (W. D. N. C. 1966).

## I. *Exhaustion of State Remedies*

[1] The State has misconceived the import of Patton's arguments. It interpets his contention to be that the second trial judge, in imposing a more severe sentence, was motivated by prejudice because of the defendant's successful attack on the initial conviction. The State's position on this appeal is that such an allegation has never been presented to the state courts, and it reasons that Patton having failed to exhaust available state remedies or to show that circumstances existed rendering the state process ineffective to protect his rights, the District Court lacked jurisdiction under 28 U. S. C. § 2254. The District Judge carefully reviewed the relevant North Carolina cases, however, and concluded that the effect of the opinions of the state supreme court is to hold that a defendant is not entitled to credit for time served and may receive an increased sentence (unless the subsequent sentence plus the time already

served under the invalid first sentence should exceed the statutory maximum).[2] We share the District Court's view that since further resort to the North Carolina courts would be futile, it is not required.[3]

## II. *Due Process*

The simplistic rationale traditionally offered for denying credit and permitting a harsher sentence at a second trial is that the prisoner, by successfully attacking his initial conviction, has "voided" or "wiped out" all consequences of that conviction—including the sentence imposed by the first judge and any time served under that sentence.[4] In State v. White, 262 N. C. 52, 136 S. E. 2d 205 (1964), the North Carolina Supreme Court stated that a defendant

> "is not entitled as a matter of law to credit against the second sentence for time served under the original sentence. The rationale of the decisions seems to be that the defendant in seeking and obtaining a new trial *must be*

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[2]State v. Weaver, 264 N.C. 681, 142 S.E. 2d 633 (1965); State v. Slade, 264 N.C. 70, 140 S.E.2d 723 (1965); State v. Anderson, 262 N.C. 491, 137 S.E.2d 823 (1964); State v. White, 262 N.C. 52, 136 S.E.2d 205 (1964); State v. Williams, 261 N.C. 172, 134 S.E.2d 163 (1964).

[3]Our conclusion is strengthened by the recent decision in State v. Pearce, 268 N.C. 707, 151 S.E.2d 571 (1966), decided since the District Court's action. In that case, the defendant's sentence was increased following his second conviction, even though "[t]he evidence on the new trial was not essentially different" from that adduced at the original trial. In his appeal to the state supreme court, the defendant relied on Judge Craven's opinion here under review, to support his argument that any increase in the punishment imposed after a second conviction was in effect a penalty for seeking review of an invalid conviction, and a violation of his constitutional rights. The Supreme Court of North Carolina, however, declined to follow that opinion, stating flatly that "[w]e adhere to our former decisions." Id. at 708, 151 S.E.2d at 572.

[4]Plainly, the trial court regarded Patton's successful attack on his original unconstitutional conviction as a waiver of the benefit of nearly five years' imprisonment.

"THE COURT: Are you referring about the prior sentence that was imposed on you?

DEFENDANT: Yes, Sir.

THE COURT: That was wiped off.

DEFENDANT: Yes, I understand that.

THE COURT: Mr. Patton, as your motion, because you moved that it be—and alleged and the Court found that your constitutional rights had been violated upon your motion, and that was all done away with. We are now confronted with a new day."

*deemed to have consented to a wiping out of all the consequences of the first trial."*[5]

262 N. C. at 56, 136 S. E. 2d at 208 (Emphasis supplied.)

The principle of fair dealing which impels judges in passing sentence to take into account the time a defendant was deprived of his liberty while awaiting trial, Dunn v. United States 376 F. 2d 191 (4th Cir. Feb. 24, 1967), insists even more inexorably that he shall not be finessed out of credit for time he was forced to serve under an invalid sentence. The trial and conviction may be voided on appeal, but the time illegally exacted by the unconstitutional sentence is an irreversible fact. It is grossly unfair for society to take five years of a man's life and then say, we now acknowledge that this should not have happened, but we will set everything right by refusing to recognize that it did happen. This is an unworthy pretense. Courts should not be astute to fashion legal fictions to attain unjust ends.[6]

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[5]It is noteworthy, however, that the North Carolina Supreme Court has, on occasion boggled at this Draconian doctrine. In State v. Weaver, 264 N.C. 681, 142 S.E.2d 633 (1965), the court quoted with approval from an opinion by the Massachusetts Supreme Court, Lewis v. Commonwealth, 329 Mass. 445, 108 N.E. 2d 922, 35 A.L.R.2d 1277 (1952), as follows:

"It is hardly realistic to say that nine months in the State prison amount to nothing—that since the petitioner 'should not have been imprisoned as he was, he was not imprisoned at all.' [Citation omitted.] Moreover, * * * the time served before the reversal of the sentence might in some other case be so long that glaring and intolerable injustice would result if the time served on a first sentence should not be taken into account in imposing a second sentence. It is not even technically correct to say that the first sentence must now be deemed to have been a nullity. It was not a nullity when it was imposed or *while it was being served.*"

Id. at 685, 142 S.E.2d at 636. (Emphasis supplied by North Carolina Supreme Court.) The North Carolina court added that "[t]he hard fact of his [Weaver's] actual service of sentence * * * cannot be ignored." Id. at 686, 142 S.E.2d at 637. *Weaver,* however, was a case in which the second sentence imposed on the defendant was the maximum allowable under the statute, so that added to the time already served under the invalid first sentence, the punishment exceeded the statutory maximum.

[6]Judge Edgerton, in King v. United States, 98 F.2d 291 (D.C.Cir.1938) characterized as "in the vein of The Mikado" the government's arguments that because the initial sentence was void, an accused "has served no sentence but has merely spent time in the penitentiary," and, that since the defendant "should not have been imprisoned as he was, he was not imprisoned at all." He facetiously suggested as logical corollaries to such arguments that the accused should also be "liable in quasi-contract for the value of his board and lodging, and criminally liable for obtaining them by false pretenses." Id. at 293-94.

The risk of a denial of credit or the risk of a greater sentence, or both, on retrial may prevent defendants who have been unconstitutionally convicted from attempting to seek redress.[7] For this reason, the District Court declared that predicating Patton's constitutional right to petition for a fair trial on the fiction that he has consented to a possibly harsher punishment, offends the due process clause of the Fourteenth Amendment.[7a] It would confront the prisoner with the unhappy choice of either abandoning his constitutional right to a fair trial and serving out his prison term under the invalid sentence, or exercising that right under the hazard, in the event of a second conviction, of being treated as though the years of imprisonment already served had never occurred.[8]

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[7]Judge Craven himself has received a letter which vividly illustrates a prisoner's fear of obtaining an increased sentence following a new trial:

"Dear Sir:

I am in the Mecklenburg County jail. Mr. _____ chose to re-try me as I knew he would.

* * *

Sir the other defendant in this case was set free after serving 15 months of his sentence. I have served 34 months and now I am to be tried again and with all probility I will receive a heavier sentence then before as you know sir my sentence at the first trile was 20 to 30 years. I know it is usuelly the courts prosedure to give a larger sentence when a new trile is granted I guess this is to discourage Petitioners.

Your Honor, I don't want a new trile I am afraid of more time * * *.

Your Honor, I know you have tried to help me and God knows I apreceate this but please sir don't let the state re-try me if there is any way you can prevent it.

Very truly yours"

256 F.Supp. at 231 n. 7. (Italics omitted.)

[7a]Cf. State v. Wolf, 46 N.J. 301, 306, 216 A.2d 586, 590-591 (1966). There the defendant, convicted of first-degree murder with a jury recommendation of life imprisonment, succeeded in obtaining a reversal on the basis of certain errors (non-constitutional in nature) committed at the trial. In holding that the State was barred on retrial from again seeking the death penalty, the Supreme Court of New Jersey found it unnecessary to decide whether the double jeopardy clause of either the federal or the state constitution, or the due process clause of the Fourteenth Amendment was applicable. The unanimous decsiion was based instead on certain "procedural policies" which were "of the essence of the administration of criminal justice."

[8]That this is a very real risk and not merely hypothetical is indicated by an informal survey conducted by the Duke Law Journal which revealed that in 72% of the retrials occasioned by the denial of counsel at the first trial, credit for time already served was effectively denied. Note, Increased Sentence and Denial of Credit on Retrial Sustained Under Traditional Waiver Theory, 1965 Duke, L.J. 395, 399 n. 25.

[2] This is like the "grisly choice" discountenanced in Fay v. Noia, 372 U. S. 391, 83 S. Ct. 822, 9 L. Ed. 2d 837 (1963). "The law should not, and in our judgment does not, place the defendant in such an incredible dilemma." Green v. United States, 355 U. S. 184, 78 S. Ct. 221, 2 L. Ed. 2d 199 (1957).[9] North Carolina deprives the accused of the constitutional right to a fair trial, then dares him to assert his right by threatening him with the risk of a longer sentence. It may not exact this price. Enjoyment of a benefit or protection provided by law cannot be conditioned upon the "waiver" of a constitutional right.[10]

Indeed, this circuit has already held it impermissible to force upon an accused the risk of more severe punishment as a condition for securing a constitutional right. In United States v. Walker, 346 F. 2d 428 (4th Cir. 1965), the defendant was initially sentenced in his absence. When he successfully attacked the sentence on this ground, he was resentenced to a longer term. Judge Bryan, speaking for the court criticized the trial judge's disregard of the original sentence:

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[9] In *Green*, it was argued that the defendant had "waived" the benefit of his first trial, in which he escaped conviction for a higher offense, as a condition for appealing his conviction of the lesser one. See United States ex rel. Hetenyi v. Wilkins, 348 F.2d 844, 859 (2d Cir. 1965), where an analogous argument was rejected with the observation that it "ignore[s] the elementary psychological realities" and presumes "a barter theory of fairness"; and United States v. Walker, 346 F.2d 428 (4th Cir. 1965), declaring that a defendant's motion to vacate his defective sentence could not be considered a waiver.

"In reality, whatever his words to the Court, Walker obviously did not desire to chance a greater term. If in law his wish 'to vacate' embraced that unnatural decision, he should not be held to it." 346 F.2d at 431.

The Supreme Court has on numerous occasions articulated its concern that access to post-conviction remedies be unfettered. See e.g., Fay v. Noia, supra; Douglas v. State of California, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963); Green v. United States, supra; Griffin v. People of State of Illinois, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956); Cichos v. State of Indiana, 385 U.S. 1020, 87 S.Ct. 699, 17 L.Ed.2d 559 (Nov. 14, 1966) (Fortas, J., dissenting); United States v. Ewell, 383 U.S. 116, 126, 86 S.Ct. 773, 15 L.Ed.2d 627 (1966) (Fortas J., dissenting).

[10] See, e.g., Lamont v. Postmaster General, 381 U.S. 301, 85 S.Ct. 1493, 14 L. Ed.2d 398 (1965); Griffin v. California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965); Sherbert v. Verner, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963); Speiser v. Randall, 357 U.S. 513, 78 S.Ct. 1332, 2 L.Ed.2d 1460 (1958); Frost & Frost Trucking Co. v. Railroad Comm'n, 271 U.S. 583, 46 S.Ct. 605, 70 L.Ed. 1101 (1926). See also Van Alstyne, In Gideon's Wake: Harsher Penalties and the "Successful" Criminal Appellant, 74 Yale L.J. 606 (1965); Note, Unconstitutional Conditions, 73 Harv.L. Rev. 1595 (1960).

> "[T]he import of the [District] Court's ruling was to condition his Constitutional right to seek correction upon the risk of another sentence, then unforeseeable in nature and extent. Thus, though not so intending, the Court potentially penalized him for asserting the privilege. This the law forbids * * *. [Citing Green v. United States, 355 U. S. 184, 78 S. Ct. 221, 2 L. Ed. 2d 184 (1957).]
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> * * *
>
> It [the second, harsher sentence] was, in sum, the product of a procedure which could prove either deterring or punitive of an insistence on Constitutional privileges."[11]

346 F. 2d at 430-431.

The District Court held that Patton's punishment could not be increased unless evidence justifying a harsher sentence appeared in the record, and that the State must bear the burden of showing that such facts were introduced at the second trial, since "where the record disclose[d] no colorable reason for harsher punishment," the effect would be to inhibit the constitutional right to seek a new trial.[12] 256 F. Supp. at 236. We agree with the District Court that it is an impossible task for the prisoner to prove improper motivation of the trial judge. It is equally impossible, and most distasteful, for federal courts to pry into the sentencing judge's motivation to ascertain whether vindictiveness played a part.

We do not think, however, that a defendant's rights are adequately protected even if a second sentencing judge is restricted to increasing sentence only on the basis of new evidence. We are in accord with the First Circuit, which has recently held that a sentence may not be increased following a successful appeal, *even where additional testimony* has been introduced at the second trial.

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[11] "Denying a benefit because of the exercise of a right in effect penalizes that exercise, making it tantamount to a crime. Punishing constitutionally protected activities seems clearly a violation of substantive due process."
Note, Unconstitutional Conditions, 73 Harv.L.Rev. 1595, 1599-1600 (1960).

[12] One commentator has noted that the strongest reason for denial of credit is the desire of courts to discourage appeals. Whalen, Resentence without Credit for Time Served: Unequal Protection of the Laws, 35 Minn.L.Rev. 239, 248 (1951).

> "The danger that the government may succeed in obtaining more damaging evidence on a retrial is just as real as the danger, for example, that the judge on his own may wish to reconsider, unfavorably to the defendant, the factors which led to his original disposition. We think that there must be repose not merely as to the severity of the court's view, but as to the severity of the crime."[12a]

Marano v. United States, 374 F. 2d 583, 585 (1st Cir. Mar. 23, 1967). Contra, Starner v. Russell, 378 F. 2d 808 (3rd Cir. May 25, 1967).

An analogy may be drawn between the solution adopted by the Supreme Court in Gideon v. Wainright, 372 U. S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963), in response to the problems raised by Betts v. Brady, 316 U. S. 455, 62 S. Ct. 1252, 86 L. Ed. 1595 (1942), and the issue here.[13] The Court had earlier held in *Betts* that, whether the conviction of an unrepresented defendant was a denial of due process depended upon whether "special circumstances" existed which would, in a particular case, "constitute a denial of fundamental fairness." 316 U. S. at 462, 62 S. Ct. at 1256. But in *Gideon,* there was forthright recognition that to require such a showing, in an area in which the chance of undetectable prejudice is so great, was too heavy a burden to cast upon an accused. The controlling point was not that the absence of counsel necessarily prejudiced the defendant, but that it created the *opportunity* for unfairness. For this reason, the *Gideon* Court made the presumption of injury irrebutable.

[3] Similarly, improper motivation is characteristically a force of low visibility. In order to prevent abuses, the fixed policy must necessarily be that the new sentence shall not exceed the old. Seldom will this policy result in inadequate pun-

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[12a] *Marano* held flatly that it would be improper for the court to increase the sentence on the basis of additional testimony which came out at the new trial, but suggested by way of dictum that in some circumstances it might not be "inappropriate for the court to take subsequent events [as disclosed in a new presentence report] into consideration, both good and bad." As to the dictum, we do not agree, for the reasons developed in the text of this opinion.

[13] Cf. Note, The Defendant's Challenge to a Racial Criterion in Jury Selection: A Study in Standing, Due Process and Equal Protection, 74 Yale L.J. 919 (1965).

ishment. Against the rare possibility of inadequacy, greater weight must be given to the danger inherent in a system permitting stiffer sentences on retrial—that the added punishment was in reaction to the defendant's temerity in attacking the original conviction. Even the *appearance* of improper motivation is a disservice to the administration of justice.

### III. *Equal Protection*

The equal protection clause of the Fourteenth Amendment likewise compels a rule barring a sentence in excess of the one invalidated, and this protection extends even to one seeking to avail himself of a state's post-conviction remedies because of non-constitutional errors in the original trial.[14]

North Carolina strictly forbids an increase in a defendant's sentence after the trial court's term has expired and service of sentence has commenced.[15] Thus the threat of a heavier sentence falls solely on those who utilize the post-conviction procedures provided by the State. If the State wishes to institute a system permitting upward revision of sentences, it must proceed upon a rational basis in selecting the class of prisoners it will subject to this threat. It may not discriminate in this regard against those who have availed themselves of the right to a fair trial. This is an arbitrary classification—offensive to the equal protection clause.[16] As the court-appointed counsel for the defendant has put it:

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[14]See Whaley v. North Carolina, 4 Cir., 379 F.2d 221 (decided this day).

[15]E.g., State v. Lawrence, 264 N.C. 220, 141 S.E.2d 264 (1965); State v. McLamb, 203 N.C. 442, 166 S.E. 507 (1932); State v. Warren, 92 N.C. 825 (1885).

[16]See McLaughlin v. State of Florida, 379 U.S. 184, 85 S.Ct. 283, 13 L.Ed.2d 222 (1964), which declares that classification "must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily, and without any such basis."

Id. at 190, 85 S.Ct. at 287 [quoting from Gulf, C. & S. F. R. Co. v. Ellis, 165 U.S. 150, 155, 17 S.Ct. 255, 41 L.Ed. 666 (1897)]. See also, e.g., Morey v. Doud, 354 U.S. 457, 77 S.Ct. 1344, 1 L.Ed.2d 1485 (1957); Skinner v. State of Oklahoma, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942).

The issue has been phrased by one writer as follows:

"Is there any rational justification for punishing *this* defendant substantially more than others who committed the same offense, simply

> "The risk of a harsher sentence is borne exclusively by those who pursue some post-conviction remedy. Yet there is no reason to suppose that the original sentences of this group are any more likely to warrant review as a class than the sentences of other convicts who are not subject to the same risk. The vulnerable class appears to be quite equivalent to a class described by race, right-handedness, indigence, or some other factor equally irrelevant in any proper determination of those whose sentences might appropriately be reviewed."[17]

Not only is the classification not a rational means for effectuating any legitimate state policy, but it also frustrates the pursuit of post-conviction remedies provided by the State. Courts should be especially vigilant to protect access to these reme-

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because *this defendant* was not given a fair trial or was not properly sentenced the first time?"

Whalen, Resentence without Credit for Time Served: Unequal Protection of the Laws, 35 Minn.L.Rev. 239, 245 (1951). (Italics in original.) His answer is that "there is no sound rationale for this treatment of an unfortunate class of criminal defendants. The injustice and illegality of the treatment the defendant has received before his first sentence began is no justification for discriminating against him at a second proceeding. * * *

"It scarcely needs argument to show that the circumstance that the defendant has received treatment in the first instance which was violative of the Constitution is not a valid reason for making the distinction. Nor is it a policy congruent with our constitution to permit courts to deny credit for time already served, and thus discourage the use of review procedures."

Id. at 251.

[17]Van Alstyne, In Gideon's Wake: Harsher Penalties and the "Successful" Criminal Appellant, 74 Yale L.J. 606, 683 (1965).

The instant case does not confront us with the question of whether the classification is reasonably related to a valid *legislative* purpose. The distinction we are asked to hold unconstitutional is solely a judicial creation, and thus cannot claim the presumption in favor of a legislatively declared public policy. There can be no justification, nor has the State offered any, for special treatment of this isolated class. Even if the State were to attempt to treat as a special class subject to increased penalties those as to whom additional adverse information were discovered after the first sentencing, the short answer, as we have shown, would be that this is prohibited. As Judge Marshall said in United States ex rel. Hetenyi v. Wilkins, 348 F.2d 844, 859 (2d Cir. 1965):

"It is difficult to understand how the fundamental unfairness inherent in allowing a prosecutor to 'do better a second time' (Mr. Justice Frankfurter, concurring in Brock v. North Carolina, supra, 344 U.S. [424] at 429, 73 S.Ct. [349], at 351, 97 L.Ed. 456) is mitigated by conditioning this second chance on a successful appeal by the accused."

dies, rather than strive to fashion a doctrine inhibiting the exercise of the right to review.[18]

Even if the State's policy is to prevent insubstantial appeals, limiting the class to successful appellants would not be a rational means of accomplishing this purpose, since it has too broad a sweep— chilling meritorious appeals as well as frivolous ones. The inequity of such a system is apparent when it is realized that only prisoners whose appeals have been found meritorious are subjected to the peril of a higher resentence. Ironically, those whom the State admits having initially denied a fair trial are the only ones who stand to receive greater punishment. Thus, the threatened class is both underinclusive, in that those who do not pursue post-conviction remedies might also have been too leniently sentenced, and overinclusive, since not all bearing the risk (and thus deterred from attacking an unconstitutional conviction) were originally dealt with too lightly.[19]

## IV. *Double Jeopardy*

[4] In view of the foregoing, we need not rest our decision on double jeopardy grounds. We are persuaded, however, that the constitutional protection against double jeopardy would

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[18]See Griffin v. People of State of Illinois, 351 U.S. 12, 18, 76 S.Ct. 585, 590, 100 L. Ed. 891 (1956), holding that even though "a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all," it cannot, without violating the due process and equal protection clauses, grant appellate review in such a way that some convicted defendants are discriminated against. This thought was further amplified by Justice Frankfurter, concurring in the judgment:

"[N]either the fact that a State may deny the right of appeal altogether nor the right of a State to make an appropriate classification, * * * nor the right of a State to lay down conditions it deems appropriate for criminal appeals, sanctions differentiations by a State that have no relation to a rational policy of criminal appeal or authorizes the imposition of conditions that offend the deepest presuppositions of our society."

351 U.S. at 21-22, 76 S.Ct. at 592. See also Douglas v. State of California, 372 U.S. 353, 365, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963) (dissenting opinion).

[19]Tussman & tenBroek, The Equal Protection of the Laws, 37 Calif. L.Rev. 341, 344-53 (1949).

also be violated if an increased sentence or a denial of credit is permitted on retrial.[20]

[5] Double jeopardy, rather than being a single doctrine, is actually comprised of three separate though related rules,[21] prohibiting (1) reprosecution for the same offense following acquittal,[22] (2) reprosecution for the same offense following conviction,[23] and (3) multiple punishment for the same offense.[24] In Green v. United States, 355 U. S. 184, 78 S. Ct. 221, 2 L. Ed. 2d 199 (1957), the Supreme Court invoked the first rule, that an accused may not be reprosecuted for the offense of which he was acquitted at the first trial. The Court held that the double jeopardy clause precluded a retrial for first-degree murder following defendant's successful appeal from his conviction of second-degree murder, on the theory that the jury in the first trial, by returning a verdict of second-degree murder, *impliedly acquitted* him of the charge of first-degree murder,

[6] In a footnote, the *Green* majority declared—without further explanation— that Stroud v. United States, 251 U. S. 15,

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[20]We find ourselves in full accord with the Second Circuit in United States ex rel. Hetenyi v. Wilkins, 348 F.2d 844 (2d Cir. 1965), as to the resolution of the issue of whether the double jeopardy clause of the Fifth Amendment is applicable to the states. That court concluded that at least certain of the policies militating against placing a defendant twice in jeopardy are "incompatible with due process of law." Id. at 850. As that circuit found true of the multiple prosecutions to which Hetenyi was subjected, similarly, we think that the North Carolina practice of permitting an accused, who has successfully appealed his conviction, to bear the risk of an increased sentence:

"[i]s that kind of double jeopardy * * * [which] has subjected him [to] a hardship so acute and shocking that our policy will not endure it * * * [and] violate[s] those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.'"

Palko v. Connecticut, 302 U.S. 319, 328, 58 S.Ct. 149, 153, 82 L.Ed. 288 (1937).

[21]See Comment, Twice in Jeopardy, 75 Yale L.J. 262 (1965).

[22]United States v. Ball, 163 U.S. 662, 671, 16 S.Ct. 1192, 41 L.Ed. 300 (1896). See Green v. United States, 355 U.S. 184, 35 Cal.Rptr. 77 (1957), for the doctrine of "implied acquittal." This doctrine has been expanded to include punishment as well as degree of offense. People v. Henderson, 60 Cal.2d 482, 35 Cal.Rptr. 77, 386 P.2d 677 (1963).

[23]E. g., In re Nielson, 131 U.S. 176, 9 S. Ct. 672, 33 L.Ed. 118 (1889). Cf. Downum v. United States, 372 U.S. 734, 83 S.Ct. 1033, 10 L.Ed.2d 100 (1963) (reprosecution barred following mistrial due to actions of the government).

[24]E. g., Ex parte Lange, 85 U.S. (18 Wall.) 163, 21 L.Ed. 872 (1873). See Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 462, 67 S.Ct. 374, 91 L.Ed. 422 (1947).

40 S. Ct. 50, 64 L. Ed. 103 (1919), was "clearly distinguishable."[25] 355 U. S. at 195, n 15, 78 S. Ct. 221, 2 L. Ed. 2d 199. There the defendant was retried for first degree murder and sentenced to death, following reversal of his prior conviction, for which he had received a sentence of life imprisonment. From a reading of the *Stroud* opinion, it appears that the case was argued to the Court on the theory that the defendant was put twice in jeopardy for the same offense merely by being retried on an indictment for first degree murder.[26] There is no indication that the Court was presented with the argument that the risk of an increased penalty on retrial violates the double jeopardy clause by being a double punishment for the same offense. *Stroud* thus stands for no more than the well-established propostion that the double jeopardy clause does

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[25]Justice Frankfurter, however, maintained that it was all but impossible to distinguish the two situations:

"As a practical matter and on any basis of human values, it is scarcely possible to distinguish a case in which the defendant is convicted of a greater offense from one in which he is convicted of an offense that has the same name as that of which he was previously convicted but carries a significantly different punishment, namely death rather than imprisonment."

355 U.S. at 213, 78 S.Ct. at 237 (dissenting opinion). The Supreme Court of California, in People v. Henderson, 60 Cal. 2d 482, 35 Cal.Rptr. 77, 386 P.2d 677 (1963), agreed with Justice Frankfurter that *Stroud* had been vitiated by *Green*. Justice Traynor, speaking for the majority, therefore held that an accused may not be given a more severe sentence on retrial obtained after a successful attack on his first conviction. The rationale appears to be that in fixing the punishment at imprisonment for life, the defendant was "acquitted" of the death penalty and hence was protected by the double jeopardy prohibition from "retrial" on the greater of the alternative punishments. (The double jeopardy provision in the California constitution is substantially identical to that of the Fifth Amendment, so that the court did not have to determine whether the Fifth Amendment provision itself was applicable.)

The California courts have not limited the application of the double jeopardy provision to cases in which the prosecutor has sought on the second trial to raise the punishment to the death penalty, but have also followed the rule laid down in *Henderson* where longer prison sentences are involved. People v. Nanga-Parbet Ali, 57 Cal.Rptr. 348, 424 P.2d 932 (Calif.Sup. Ct. Mar. 3, 1967); In re Ferguson, 233 Cal. App.2d 79, 43 Cal.Rptr. 325 (1965).

[26]The Court discussed only that aspect of double jeopardy which protects a defendant from a "second trial" and held that since the accused had himself appealed his conviction and sought a new trial, he was not entitled to invoke the double jeopardy provision of the Constitution. 251 U.S. at 18, 40 S.Ct. 50.

not entitle a defendant who successfully attacks his conviction to absolute immunity from reprosecution.[27]

It is clear, therefore, that the Court was concerned in *Green* only with that aspect of double jeopardy which prohibits multiple *prosecutions* for the same offense, and was not faced with the precise question that is before us—whether a harsher punishment following retrial for the same offense is prohibited by the double jeopardy clause.

Patton analogizes his situation to that in *Green* asserting that as Green was "impliedly acquitted" of the *greater degree* of murder when he was convicted of the lesser degree of that offense, similarly, Patton was "acquitted" of any *higher penalty* when he was sentenced to twenty years' imprisonment. And as the accused in *Green* was protected by the double jeopardy clause from retrial for *first* degree murder, by a parity of reasoning, Patton contends that the double jeopardy clause protects him from being "retried" for the penalty of which he had been "acquitted" at his first trial, namely, anything between the twenty years he actually received and the statutory maximum. On retrial, he asserts, he could only be given "up to the degree of punishment of which he was originally convicted."[28]

Defendant recognizes, and we agree, that to maintain that he was "acquitted" at the first trial of any penalty greater than twenty years, is as much a fiction as that he has "waived" the benefit of his initial sentence by appealing his conviction.[29] For this reason, we do not rest solely on the "implied acquittal" doctrine, preferring to emphasize a somewhat different aspect of double jeopardy—the prohibition against multiple punishment. See Ex parte Lange, 85 U. S. (18 Wall.) 163, 21 L. Ed. 872 (1873).[30] It is this aspect which has been consist-

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[27]See, e.g., Bryan v. United States, 338 U.S. 552, 70 S.Ct. 317, 94 L.Ed. 335 (1950); United States v. Ball, 163 U.S. 662, 16 S.Ct. 1192, 41 L.Ed. 300 (1896).

[28]Van Alstyne, op. cit. supra, note 17, at 635. See Whaley v. North Carolina, 379 F.2d 221 (decided this day).

[29]See Part II, supra.

[30]"If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same

ently relied upon to prohibit an increase in a defendant's sentence, once service has commenced. E.g., Ex parte Lange, supra; United States v. Benz, 282 U. S. 304, 307, 51 S. Ct. 113, 75 L. Ed. 354 (1931); United States v. Sacco, 367 F. 2d 368 (2d Cir. 1966); United States v. Adams, 362 F. 2d 210 (6th Cir. 1966); Kennedy v. United States, 330 F. 2d 26 (9th Cir. 1964).

We perceive no constitutionally significant distinction between the increases prohibited in the cases cited above and an increase in punishment following retrial. Thus, unless a defendant is held to waive this double jeopardy protection in seeking a new trial, a harsher penalty may not be imposed. And we have already declared, in Part II of this opinion, that we decline to predicate a prisoner's exercise of his right to seek a new trial on the fiction that he has "waived" the benefits of his initial sentence, because of the restrictive effect this has on access to post-conviction remedies.[31] This is in accord with this circuit's decision in United States v. Walker, 346 F. 2d 428 (4th Cir. 1965), that, in seeking correction of an erroneous sentence,[32] a defendant does not waive his double jeopardy right

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offence. And * * * there has never been any doubt of * * * [this rule's] entire and complete protection of the party when a second punishment is proposed in the same court, on the same facts, for the same statutory offence.

[*T*]*he Constitution was designed as much to prevent the criminal from being twice punished for the same offence as being twice tried for it.*"

85 U.S. at 168, 173, 21 L.Ed. 872. (Emphasis supplied.)

That the framers were concerned with multiple punishment is idicated by the text of the double jeopardy provision initially proposed by Madison, cited in Green v. United States, 355 U.S. 184, 201-202, 78 S.Ct. 221, 231 (1957) (dissenting opinion of Frankfurter, J.): "No person shall be subject, except in cases of impeachment, to more than one punishment *or* one trial for the same offence * * *." (Emphasis supplied.)

[31]The primary focus of the majority opinion in *Green* was not on protecting the accused from reprosecution per se, but on protecting his access to post-conviction remedies. See United States v. Ewell, 383 U.S. 116, 127-128, 86 S.Ct. 773, 780, 15 L.Ed.2d 27 (1966) (dissenting opinion of Fortas, J.):

"Although the decision in *Green* was premised upon the Double Jeopardy Clause, its teaching has another dimension. *Green* also demonstrates this Court's concern to protect the right of appeal in criminal cases."

See also Van Alstyne, op. cit. supra, note 17, at 632.

[32]See Note, 80 Harv.L.Rev. 891, 896-97 (1967), where this concept was developed with specific reference to the District Court's decision in the present case.

not to be subjected to multiple punishment. See Walsh v. United States, 374 F. 2d 421, 426 (9th Cir. 1967) and Ekberg v. United States, 167 F. 2d 380, 388 (1st Cir. 1948), discussed more extensively in Whaley v. North Carolina, 4 Cir., 379 F. 2d 221 (decided this day).

To summarize, we conclude that increasing Patton's punishment after the reversal of his initial conviction constitutes a violation of his Fourteenth Amendment rights in that it exacted an unconstitutional condition to the exercise of his right to a fair trial, arbitrarily denied him the equal protection of the law, and placed him twice in jeopardy of punishment for the same offense.

We affirm the District Court's order to release the defendant from confinement unless he is constitutionally resentenced by the state court to a term not exceeding 20 years from the date of his original sentence, passed on October 26, 1960, with full credit for the time already served.[33]

Affirmed.

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[33]Consequently, having now served nearly 7 years of his 20 year sentence, Patton is presently eligible to be considered for parole. See N.C. Gen.Stat. § 148-58 (Replacement vol. 1964), which provides that a prisoner shall be eligible for parole after serving a fourth of a determinate sentence.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 11,266

Filed
Oct. 5, 1967
Maurice S. Dean
Clerk

LEE SHEAR,
*Appellant,*

versus

OTTO C. BOLES, Warden of
The West Virginia State Penitentiary,
*Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA, AT ELKINS.

## MEMORANDUM DECISION

Lee Shear, a West Virginia prisoner, appeals from an order of the District Court (Maxwell, J.) denying his petition for habeas corpus. The District Court granted Shear a certificate of probable cause to appeal.

In 1964 Shear pleaded guilty to two felony charges and was sentenced to concurrent ten-year terms. Later that year the District Court, in a habeas corpus proceeding, found these convictions invalid and ordered Shear released or retried. The state chose to reprosecute Shear and in separate trials he was reconvicted of both charges by juries. This time, however, his punishment was fixed by the court at two consecutive fifteen-year sentences. In his petition in the District Court, Shear complained that this increased sentence after retrial was unconstitutional.

The District Court rejected Shear's argument.[1] However, since the date of the District Court's opinion, this Court has held it to be a violation of constitutional guarantees to increase punishment on a retrial. *Patton* v. *North Carolina*, ___ F.2d ___, No. 11,005 (4th Cir.), *rehearing en banc denied*, Sept. 5, 1967. We feel it appropriate, therefore, to remand the present case to the District Court for its consideration in the light of Patton.[2]

A true copy,
Teste:

Maurice S. Dean, Clerk,
U. S. Court of Appeals for the
Fourth Circuit.

By Margaret M. Walton,
Deputy Clerk.

The judgment of the District Court is reversed and the case is remanded for further proceedings consistent with this opinion.

CLEMENT F. HAYNSWORTH, JR.
Chief Judge, Fourth Circuit

SIMON E. SOBELOFF
United States Circuit Judge

/s/ JOHN D. BUTZNER, JR.
United States Circuit Judge

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[1] 263 F.Supp. 855 (N.D. W.Va. 1967).

[2] The District Court also declined to consider Shear's claim based on Escobedo v. Illinois, 378 U.S. 478 (1964), on the ground that Shear had not exhausted his state remedies. Our review of the record indicates that while the admissibility of Shear's confession was presented at least at one of the retrials, Shear did not appeal the convictions and has not raised the issue by way of available state post-conviction remedies. Thus, the District Court's ruling that Shear has not exhausted his state remedies with this issue appears correct. Shear did present his increased punishment claim to the West Virginia Supreme Court of Appeals in an unsuccessful habeas corpus petition.

# APPENDIX C

## ORDERS BELOW

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
AT WHEELING

Civil Action
File No. 1389-W
Habeas Corpus

LEE SHEAR,

*Petitioner,*

vs.

OTTO C. BOLES, Warden of the
West Virginia State Penitentiary,

*Respondent.*

## ORDER OF RELEASE

Upon the findings and conclusions and for the reasons stated into the record, the convictions of the petitioner by the Intermediate Court of Ohio County, West Virginia, and the sentences and commitments dated February 14, 1964, are set aside and declared void. The petitioner shall be released from his present confinement thereunder.

This order of release is without prejudice to the right of the State to rearrest and retry the petitioner upon the indictments or for the offenses with which he was charged, and execution of this order of release shall be stayed for a period of 10 days from and after this date, to permit the State to initiate such proceedings. Any such proceedings shall be promptly conducted to accord the petitioner a speedy retrial, and this court retains jurisdiction of this cause to entertain any motion or to make any further order which the ends of justice may require.

Upon application of the petitioner, during the period of stay, petitioner may be admitted to bail for the balance of said period upon furnishing bond, with approvevd security, in the amount of $2,500.00.

This order shall be served upon the respondent and copies thereof, by mail, upon the Attorney General of the State of West Virginia, the petitioner, and his counsel.

ENTER: September 22, 1964

CHARLES L. PAUL
United States District Judge

I hereby certify that the annexed instrument is a true and correct copy of the original on file in my office.
Attest: J. C. Strickling
Clerk, U. S. District Court
Northern District of West Virginia

By: Ray D. Sommerville
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

LEE SHEAR, *Petitioner*,

vs.

Civil Action File No. 570-E
HABEAS CORPUS

OTTO C. BOLES, Warden of the West Virginia State Penitentiary,
Respondent.

U. S. District Court
Filed at Elkins, W. Va.
February 6, 1967
Thomas F. Stafford
Clerk

## ORDER

The Court, having considered the above petition for a writ of habeas corpus, is of the opinion that, for reasons stated in a written Memorandum now ORDERED filed, the Petitioner is not entitled to the relief sought in said petition.

It is accordingly ORDERED that the petition earlier filed be, and the same is hereby, dismissed.

If the petitioner desires to appeal the decision of this Court, notice of appeal must be received by the Clerk of this Court within thirty (30) days from the date of entry of this order. A copy of the notice of appeal must be mailed to the Attorney General of West Virginia, attorney for the Respondent.
Enter: Feb. 6, 1967

ROBERT E. MAXWELL
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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**No. 11,266**

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LEE SHEAR,
*Appellant,*

vs.

OTTO C. BOLES, Warden of the
West Virginia State Penitentiary,
*Appellee.*

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA, AT ELKINS

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Upon consideration of the petition of the appellee, by his counsel, and for cause shown,

It is ordered that the memorandum decision of this Court issued on October 5, 1967, be, and it is hereby, recalled and the Clerk of the District Court is hereby directed to return the memorandum decision forthwith to the Clerk of this Court.

Further ordered that the memorandum decision be, and it is hereby, stayed pending application of the appellee in the Supreme Court of the United States for a writ of certiorari to

this Court, provided the application for a writ of certiorari is filed in the Supreme Court of the United States within the time prescribed by law.

FILED
Oct. 26, 1967
MAURICE S. DEAN
CLERK

JOHN D. BUTZNER, JR.
United States Circuit Judge.

A true copy
Teste:

MAURICE S. DEAN, Clerk,
U. S. Court of Appeals for the Fourth Circuit.